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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland

MALCOLM J. COAN

STATE REPORTER

VOLUME 182

Including Cases of April and October Terms, 1943, and
January Term, 1944

Published by Authority

GEORGE W. KING PRINTING CO.

BALTIMORE:

1945

In Memoriam

Exercises in honor of the late Judge T. Scott Offutt, whose death occurred December 24, 1943, were held by the Appellate Court in the Court Room on Tuesday, February 8, 1944. Addresses were delivered by Attorney-General Walsh and other members of the State Bar, and Chief Judge Sloan responded on behalf of the Court. The various addresses and the response thereto follow:

THE ATTORNEY-GENERAL:

It is with a deep feeling of personal sorrow that I announce to your Honors the death on December 24, 1943, of Judge T. Scott Offutt, who served with distinction as Chief Judge of the Third Judicial Circuit of Maryland, and as a member of this Court for more than twenty years.

Judge Offutt was the son of William Scott Offutt and Henrietta L. H. Baker Offutt, and was born on a farm in Montgomery County on June 12, 1872. He was educated in the public schools of that county, and from 1891 to 1893 was a student at the University of Virginia. Shortly afterwards Judge Offutt moved to Towson, Maryland, and began the study of law in the office of his cousin, Mr. Milton W. Offutt, and he was admitted to the Maryland Bar in 1898. He was first associated with Mr. Milton W. Offutt, then with Major John I. Yellott, and his son, Mr. Osborne I. Yellott, and later practiced law alone for many years. He served as counsel to the Board of County Commissioners of Baltimore County from 1914 to 1920, and during this time he published "Offutt's Code of Local Laws of Baltimore County" which was of great assistance to the members of the Bar in that county, and he was also co-author with the late Walter L. Clark, of Baltimore City, of a book entitled "Civil Rights of Soldiers and Sailors."

In April, 1920, the late Governor Ritchie appointed him Chief Judge of the Third Judicial Circuit of Mary-

land, and a member of the Court of Appeals, to succeed the Honorable N. Charles Burke, who had resigned after a long and distinguished career on the Bench, and in the fall of 1921 the voters of his circuit elected him for a term of fifteen years. Upon the expiration of that term in 1936, he was reappointed by the late Governor Nice, a Republican, to hold the office until the election in 1938, when he was again chosen by the voters for another term, which ended in June, 1942, when he reached the constitutional age limit of seventy years.

Judge Offutt was a past president of the Maryland State Bar Association, was a past president of the Maryland Society of the Sons of the American Revolution, was an active member of the American Law Institute, twice served as president of the Judicial Section of the American Bar Association and was for twenty years a member of its General Council, and later of its House of Delegates. He was likewise a member of the Judicial Council of Maryland, served as chairman of the Soldiers and Sailors Commission of the Maryland Bar Association after the first World War, was a member of the Baltimore County Bar Association, and the Lawyers' Round Table. He belonged to the Maryland Club, and was also an active and prominent member and officer of several Masonic Lodges and of the Elks, and he served as a member of the Maryland Tercentenary Commission.

Prior to his elevation to the Bench, Judge Offutt was one of the leading lawyers of the State, and during his service on the Bench he became one of Maryland's most distinguished judges. Like many of the other outstanding members of our profession, Judge Offutt came up the hard way. Possessed of little more than a high school education he undertook the study of law in the office of his cousin, supporting himself by outside work in the meantime, and by studious application he qualified for admission to the Bar. The mental discipline and industry which this required developed his naturally fine mind, and the labor he continued to devote to the study of law in attending to the large and varied practice which he soon acquired enabled him to master the principles

of the law and to understand the reasons for those principles. His skill as a trial lawyer had brought him the leadership of the Baltimore County Bar for some years prior to his appointment to the Bench, and the lessons learned in the court room had taught him much about human nature and given him that ability to apply correct legal principles to the varying relations of human beings which is so essential to the proper administration of justice.

Thus equipped, he came to the Bench and both in this Court, where his opinions will always stand as monuments to his industry and ability, as well as at *nisi prius* he soon demonstrated both the breadth of his knowledge and the soundness of his judgment.

His opinions are exhaustive. Not content with reaching a sound conclusion supported by adequate authority, Judge Offutt explored the reasons on which the authorities rested, weighed the relative value and cogency of any differing theories which existed on the questions before him, and sought the answer best suited to the ends of justice. As a result his printed opinions are veritable storehouses of legal knowledge and should it be suggested that some of them are perhaps unnecessarily exhaustive, I would reply without fear of successful contradiction that they represent the work of an inquiring and unusually able mind seeking, within the limits of human knowledge and understanding, to work out exact justice in the controversies which he was called upon to decide for his fellow citizens. In doing this, after marshalling the facts, he investigated thoroughly the legal principles urged by both sides and by discussing and analyzing them all he was able to determine their proper application *vel non* to the matter before him and he thus gave the *ratio decidendi* as well as the decision itself. Such opinions are particularly satisfactory to the litigants, for they show both sides that their arguments have all been considered and they also show the loser why his arguments have not prevailed, and certainly they are most helpful to the legal profession be-

cause they give us all sides of the question as well as the conclusion.

In addition to his preeminence in legal circles both in Maryland and throughout the country, Judge Offutt acquired distinction in the fraternal organizations to which he belonged, was deeply interested in the history of our State and Nation, and was for many years the leading citizen of his county and one of the most outstanding Marylanders of his day. He was on several occasions seriously considered for the Governorship, and was also suggested as a candidate for the Democratic nomination for the United States Senate, but he gave no encouragement to the friends who proposed his name for these offices. He preferred the study of the law and the calm dignity of judicial work to the clamor of the political arena, and while his splendid qualifications and prominence throughout the State would undoubtedly have brought him widespread support for either office, he quietly let it be known that he was not interested in leaving the Bench to seek political honors no matter how high they might be.

Judge Offutt was always deeply interested in all forms of athletic contests, was himself an excellent tennis player and golfer, and loved to roam through the fields with his dog and gun. He served at different times as director or trustee of various financial, charitable and educational institutions, took an active and leading part in civic and community matters, and can truly be said to have lived a long and remarkably useful life, devoted to the best interests of the county in which he lived and the State which he served so well.

Judge Offutt married Miss Lydia Trail Yellott, who, with two of their children, T. Scott Offutt, Jr., and Mrs. Daniel Breckenridge Blackburn, III, survive him. A third child, John, who became a member of the Bar and to whom he was particularly devoted, was drowned at Ocean City, Maryland, in the summer of 1940. Shortly after this tragedy Judge Offutt suffered a stroke from which he never fully recovered, and he was finally called to his eternal reward on December 24, 1943.

Judge Offutt was a forceful and gifted judge. His claim to fame is soundly established in the opinions which he prepared for this Court, and these opinions will be cited as precedents and will serve as guide posts in the administration of justice in Maryland in all the years to come. This is true of all the Judges of the Court of Appeals of Maryland, and is honor enough for any man, but in the case of Judge Offutt it can be confidently predicted that the future historian of the Court will place his name high on the list of the most distinguished jurists who have served as its members, and in the history of our State he will always rank as one of its truly outstanding citizens.

Mr. James C. L. Anderson, of the Baltimore County Bar, Major Robert H. Archer, of the Harford County Bar, and Mr. Walter H. Buck, of the Baltimore County Bar, will deliver addresses on Judge Offutt and I now respectfully move that this Honorable Court have appropriate minutes entered on its records in commemoration of the very able judge in whose honor we meet.

JAMES C. L. ANDERSON:

It is with sincere regret that I today formally announce to this honorable Court the death on December 24, 1943, of Thiemann Scott Offutt, who served for many years as one of the Judges of this Court, and who undoubtedly was one of the outstanding Maryland jurists of his time. Judge Offutt was born in Montgomery County, Maryland, on June 12, 1872, the son of a farmer, and it was on his father's farm he spent the early years of his life. He attended the local rural school until about eighteen years of age, and then some years afterwards took a special study course at the University of Virginia, the cost of which, he said, amounted to several years labor as a clerk in a country store. Later he came to Baltimore County, where he studied law in the office of a relative in Towson and was admitted to the Bar in 1898 when twenty-six years of age. Thus, he attained his first ambition, acquiring it in the hard way, and developed the

qualities which made him respected and admired by the citizens of his county and his State. By nature he was gifted with a powerful physique, and a mind equally possessed of latent power, which from the beginning of his practice he never permitted to remain idle or inactive, but improved and developed by industry and devotion to study until he attained the highest legal position which could be bestowed upon him by his county and his State.

During the period from his admission to the Bar as a practicing attorney until his appointment in 1920 as Chief Judge of the Third Judicial Circuit and a member of the Court of Appeals, his practice was large and varied, and he was engaged in cases covering almost every known branch of the law. Almost from the time he started practicing, and certainly for many years preceding his elevation to the Bench, he was on one side or the other of practically every important case tried at Towson. No lawyer could have been more painstaking and thorough in the preparation, and more proficient in the presentation of his various cases than was Thiemann Offutt, as he was then called by his friends and associates. And to him the performance of his duty and the trial of his cases to the best of his ability, was a far greater goal to be attained than the monetary compensation he derived from his clients. No matter how small the case or how meager the fee, his efforts on behalf of these clients were of the same high character as those which might involve far larger remuneration. He was untiring in the preparation of his cases, in the marshaling of his facts, a master at cross-examination, and a most vigorous advocate before a jury. In the argument of points of law he was most impressive, and the judges before whom he appeared, even though in some cases not agreeing with him, nevertheless, highly respected his opinions, his honesty in his views and realized the great care which should be exercised by them in reaching their decisions because of his conceded knowledge of the law. He was a formidable adversary, and every lawyer who opposed him knew that a real battle was before him,

with an opponent who would avail himself of the use of every legal weapon at his command.

After his elevation to the Bench, while he was an active member of the Court of Appeals and wrote his full share of the opinions handed down by that Court, which my brothers will more specifically refer to, nevertheless, he also found time to devote to the work of the Circuit Court for Baltimore County, and the *nisi prius* cases connected therewith, and he rarely missed being present at the opening of each term of court when he always delivered the charge to the Grand Jury, clearly and concisely outlining their duties and powers.

It was always a pleasure to try cases before him, and while he presided over his court with a firm hand, there was always an atmosphere of dignity, and every litigant and every lawyer knew that any decision rendered by him would not only be within the confines of the law, but would be rendered in justice and truth as he saw it, and as the law applied to the facts. He was always kind, courteous and most helpful, especially to the younger members of the Bar who needed guidance and assistance. Injecting a personal note, I shall never forget one lesson he taught me shortly after his accession to the Bench. I carelessly said: "Judge, I suppose there is no doubt about something," referring to a point of law, to which he replied, "I have never seen any question of law yet about which there isn't some doubt." The rugged honesty of that answer is most apparent in the practice of our profession, and certainly that statement has been well substantiated by the decisions of this honorable Court when passing upon the various questions of law upon which one side or the other manifestly thinks there is still some doubt.

One of his great interests in Towson was the development of the law library. In it can probably be found almost every case decided by courts of record in this county, and also many decisions of the English courts. It contains an excellent assortment of text books, encyclopedias and digests, and it was under the personal supervision of Judge Offutt that this library was de-

veloped and maintained, and in the preparation of his opinions he availed himself of its many facilities, working therein far into the night on frequent occasions.

Possessed as he was of an active and virile mind, he was also possessed of a strong and vigorous body, and throughout his entire life he was greatly interested in sports and games. In his early years he was a fine tennis player and in later years turned to golf, but his interest was in all forms of athletic competition, which he often said fitted a man for his work as well as his play. That competition of a physical nature helped to develop mental acuteness was one of his beliefs, and every available opportunity found him attending competitive sporting events of every character. Indeed, after he was so unfortunately stricken in 1940, and when to a greater or less extent his former vigorous faculties were impaired, nevertheless, he was always interested in radio programs of sporting events, and almost to the end of his life he never missed a sports program on the air.

Judge Offutt was a member of the Judicial Council of Maryland, and after the First World War served as chairman of the Soldiers' and Sailors' Memorial Commission of the Maryland State Bar Association. He was president of this association for the 1923-1924 term, and served on many of its committees. He was an active member of the American Bar Association, and was president of its Judicial Section in 1927 and 1928. For twenty years he was a member of its General Council, and later of its House of Delegates, as well as being an active member of the American Law Institute.

In addition to his legal attainments, for which he was so justly famed, his interest in civic activities and fraternal organizations was keen and active. He was president of the Maryland Society of the Sons of the American Revolution, a member of the Maryland Tercentenary Commission, past master of Mount Moriah Lodge No. 116, A. F. & A. M., past senior grand warden of the Grand Lodge of Masons of Maryland, and a past exalted ruler of the Towson Lodge of Elks. For many years he was a senior warden of Trinity Protestant Episcopal

Church of Towson, and he was an ardent churchman, with a profound respect for his religion and his God.

No civic or patriotic public meetings in Towson and Baltimore County were ever complete without his presence, and the fact that he was listed as a speaker on these occasions always drew large and enthusiastic audiences, and his remarks were of such a stirring nature and so beneficial, that it was always a pleasure as well as an education to have the opportunity to hear him.

His involuntary retirement from active life and his subsequent death were a distinct loss to the people of his county and his State. No person possessed of his qualities and characteristics could be removed from our midst without leaving a decided void, and this is equally true of the Court wherein he served so faithfully and so well over a period of twenty years. He will always be remembered by judges and lawyers who knew him as an indefatigable worker, possessed of a tremendous reserve of energy and power, and the learned opinions which he wrote will of themselves always be a lasting monument to his ability and a memorial of his splendid legal attainments. His life exemplified that no matter how humble one's origin may be, there is always a place at the top of a chosen profession for those who through intelligence, industry and ambition bring as nearly as humanly possible to perfection those qualities which are reflected in the finest and strongest of characters.

He loved his home and he was a most devoted husband and father. He is survived by his widow, who before her marriage was Lydia Trail Yellott, a daughter of Major John I. Yellott, and by a son, Thiemann Scott Offutt, Jr., and a daughter, Mrs. Daniel Breckenridge Blackburn, 3rd. Another son, John, predeceased his father, and it was his fatal accident in the summer of 1940 which probably precipitated the stroke which Judge Offutt shortly thereafter suffered, and from which he never recovered.

His passing is mourned not only by his family, but by the jurists with whom he served, the members of the Bar who had the privilege of association with him, and

by his many friends in Baltimore County and the State who knew and loved him as a man. To me personally he was always an inspiration, and I feel that I have lost a true and sincere friend.

ROBERT H. ARCHER:

To your Honors, the Chief Judge and Associate Judges of the Court of Appeals of Maryland, the Circuit Judges, other distinguished guests, members of the Bar and the family and friends of Judge Offutt:

I consider it a signal honor that I was selected to represent the Harford Bar Association at these memorial services.

At the recent meeting of the State Bar Association, I heard Mr. Burke read the resolution which was adopted by that association in reference to Judge Offutt, and today members of the Bar and the judiciary have and will further elaborate on the splendid record of Judge Offutt as a member of the Bar and the judiciary of this State, together with his exemplary life and character.

I am going to confine my remarks to the subject of Judge Offutt as I knew him. As an older member of the Bar I had the opportunity of trying cases both against and with him, and I would characterize his practice at the Bar in football parlance as "a lawyer who played hard but played fair."

The first time I saw Judge Offutt was shortly after my admission to the Bar when another attorney and I brought suit against the Baltimore and Ohio Railroad in Harford County and the case was removed to Baltimore County for trial. The attorney for the railroad did not follow the case but referred it to Baltimore County counsel. When we appeared in the court room, two young inexperienced lawyers, we were confronted by Major Yellott and T. Scott Offutt, representing the defendant. We surely had a rough time of it and had it not been for the timely assistance of Judge Duncan, I doubt if we could have gotten our case to the jury.

We finally did, however, and luckily got a small verdict. After that, when I needed associate counsel in Towson, I employed Scott Offutt, and through this association I learned a great deal, both as to his legal ability and character.

Later, when a vacancy occurred in the Chief Judgeship of this Circuit, I had the honor to be one of the committee of the Harford County Bar which presented the endorsement of that body for Judge Offutt's appointment to Governor Ritchie.

In helping in my small way to secure this appointment for Judge Offutt, I feel that I performed a service to the State of which I have always been proud.

Judge Offutt was a lover of outdoor sports. I remember shortly after I met him I was in Towson a day in April, and he asked me if I would like to ride in on the street car to the ball park and "see what Jack Dunn had brought up from his training camp." I readily accepted and we had the pleasure of seeing Babe Ruth pitch his first professional baseball game in Baltimore, and I recall Judge Offutt on that occasion saying in referring to Ruth, that, "I believe he will make the grade."

Judge Offutt was appointed to the Court of Appeals about the same time as Judges Digges, Parke and Walsh, and these four judges surely made life miserable for the lawyers who argued cases before the Court which were without merit or in which counsel was not fully prepared. I do not know whether they ever knew it or not, but on the outside of the Court they were referred to as the "Connie Mack infield." As they faced the counsel Judge Offutt sat in the position of the third base, Judge Digges short stop, Judge Parke second base, and Judge Walsh first base, and many a young attorney who thought he was going to make a safe legal hit through that infield found himself doubled up by a play from Offutt to Digges to Parke to Walsh, and when it was all over the batter often wondered why he had come to the Court of Appeals at all.

Judge Offutt was appointed to the Court of Appeals at a time shortly after a great many of the State Boards

and Departments had been created by the Legislature, and it became the duty of the Court to define the rights, duties, powers and limitations of these Boards and Departments. I argued a number of these cases due to the fact that I was in the Attorney General's office at that time and a number of important decisions affecting these State agencies were written by Judge Offutt.

In writing these opinions, Judge Offutt considered every point of both law and fact presented by the opposing counsel and left no shadow of doubt in anyone's mind as to what the decision of the Court was. One of these cases was the *Susquehanna Power Company v. State Tax Commission*, reported in 159 Md., which involved the assessment against a public utility company in Harford and Cecil counties on real estate, tangible personal property and intangible personal property amounting to more than thirty million dollars (probably a small amount in these days, but considered quite a large one at that time). In this opinion Judge Offutt clearly defined the legal method of assessing these several types of property, and clearly established for the first time in this State what the proper procedure was. The Power Company appealed this case to the Supreme Court of the United States, where Judge Offutt's opinion was affirmed.

Another of these cases was *Murphy v. State Roads Commission*, reported in 159 Md. (commonly known as "The Sour Apple Tree Case", because the road in question was known as the "Sour Apple Tree Road"). This case involved the right of the State Roads Commission to use its judgment and discretion in the location of State roads without being subject to review by the courts. The Court, through Judge Offutt, clearly defined the law governing the rights and powers of the State Roads Commission and stated that the action of a State agency in such matters is not subject to judicial review unless it is a decision so oppressive, arbitrary or unreasonable as to suggest bad faith.

Another important case affecting our roads system was the case of *Krebbs v. State Roads Commission*, re-

ported in 160 Md. It was a case which originated in the Circuit Court for Baltimore County. A large number of claims at that time were pending throughout the State Roads Commission for losses claimed by owners of property by virtue of the Commission changing the location of the State roads. In this case, which was probably the most aggravated, a bill of complaint was filed against the Pennsylvania Railroad and the State Roads Commission to prevent the closing of the grade crossing at Parkton, and the substitution of an overpass, until the property owners living on either side of the crossing were compensated for the property loss resulting from the closing of said crossing. In sustaining the demurrer of the respondents, and dismissing the bill, Judge Offutt, in his written opinion, thoroughly reviewed the law as to the rights acquired in public highways by the owners of abutting property. The Court of Appeals, in sustaining Judge Offut's opinion in this case, copied his opinion practically verbatim.

In his opinions in connection with these subjects, Judge Offutt was always careful to preserve the rights of the individual and not permit the State, through its agencies and departments, to infringe in any way upon the privileges guaranteed to its citizens by the Constitution and the Bill of Rights.

I also had an occasion to see another side of Judge Offutt's character. I, together with Mr. Jenifer, represented a defendant in the trial of a damage suit in Towson. After the trial of the case, in which the jury allowed large damages against the defendant, we discovered that the attorney for the plaintiff had procured and presented perjured testimony to support his case. This matter was referred to the Grand Jury by Judge Lawrence and we, as counsel, were summoned to appear as witnesses. We were immediately beset by pressure, both from inside and outside the Bar, urging us to use our influence to have the charges against this attorney dropped.

Both Mr. Jenifer and I were pictured as "persecuting" rather than "prosecuting" witnesses. In my dilemma I went to Judge Offutt. Sitting in his office he patiently

listened to my description of what had occurred, and when I had finished he told me he had also been importuned, and the only excuse he could make for such action was ignorance.

He then proceeded in his clear and logical manner to define to me the duties and obligations which a member of the Bar owes to the Court, to the other members of the Bar, and to the citizens of our State. When he finished talking I felt that my duty in the matter was clear. I am now living in the hope that I can, as long as I practice law in this State, follow the rules of conduct laid down to me by Judge Offutt in that talk.

The loss of Judge Offutt to Maryland cannot be overestimated.

For my part, I can only add that in the untimely illness and death of Judge Offutt I lost a wise counsellor and sincere friend.

WALTER H. BUCK:

It is a difficult matter in a short address to do more than to give the bare outlines of the character, ability and personality of so unusual a man and judge as the late T. Scott Offutt. Only my great respect for his memory induces me to attempt, though briefly, to do a little more.

Born of a sturdy pre-Revolutionary family on his father's farm in Montgomery County, he came to Towson as a young man; and at the age of twenty-six, began the practice of law.

From the first he was a hard worker. He had, too, the advantage of a thorough training in law in the office of Major John I. Yellott. Major Yellott was a lawyer of ability of the old hard school, which school was the best for the legal training of the practitioner or the judge. Major Yellott was thoroughly versed in all matters of practice and perfectly at home at the trial table. In this setting the future judge applied himself with vigor and soon mastered the general principles of law; gradually becoming a trial lawyer of uncommon ability.

He was equally forceful and effective before the court and before the jury.

Of a rugged constitution it was not unusual for him to be at the trial table until court adjourned, then to go to the Mt. Washington Cricket Club to play tennis and after dinner at home in the evening to go to his law office to work. In his office he literally burned the midnight oil and old residents of Towson remember seeing him at work there until well into the morning. He was noted for the thorough preparation of his cases, both on the facts and on the law and was an excellent cross-examiner.

Upon the resignation of the late N. Charles Burke as Chief Judge of the Third Judicial Circuit, Judge Offutt was appointed by Governor Ritchie to fill the vacancy thus created, and he continued in that office until he reached the retirement age. It can be said of him, with confidence, that he was not one of those judges, ironically referred to by Bracton, "who mount the seat of judgment before they have learned the laws."

The last case in this court where he appeared as an attorney was *Blunt v. Blunt*, 136 Md. 194, decided March 16, 1920.

His first opinion as a judge of this Court was in the case of *Annarina v. Boland*, 136 Md. 365, decided April 23, 1920.

A reading of the opinions of Judge Offutt, in my judgment, gives a true index of the man and of the judge. He believed in the principles of constitutional law as they had successfully developed under our unique American system of a written Constitution construed and applied by an independent court. He believed, too, in the principles of the common law which had been worked out by the courts in cases litigated before them and thought it unwise to make hasty departures from those principles. For the skepticism, not to say nihilism, of the modern school of law, he had nothing but scorn. He knew that law was a system and could not be based on nothingness or on contempt for the experience of the past. He knew that it could not change with every wind

that blew in order to adjust itself to some supposed new "social" balance. His basic belief was that under our system it is the bounden duty of the courts to protect personal liberty and private property.

His opinions show that he made no attempt to develop a particular style for their expression. They show, however, that he actually wrestled with the facts and with the law in every opinion he wrote. He would never have been content to make his own short summary of what the facts were said to indicate and then to run the case into a legal pigeonhole by citing other cases.

That a person accused of crime, no matter how worthless such person might be, should have the full protection of the safeguards of our system he insisted upon.

It is only necessary to read the cases of *Dobbs v. The State*, 148 Md. 34, and *Duffy v. The State*, 151 Md. 456, to understand his views that these safeguards should be protected from gradual encroachment. In *Dobbs'* case the traversers were tried before three of the judges in Baltimore City, sitting as a jury. In that case, the State's Attorney was permitted, over the objections of the defendants, to state to the court sitting as a jury that one or the other of several defendants had committed a series of crimes in no way connected with the crime charged in the indictment and also that they had planned to commit a number of other crimes, all of which the State's Attorney described in detail, and evidence of these alleged other crimes was also admitted. There was no doubt that this action on the part of the State's Attorney was illegal, but the real question was whether what had been done by him constituted reversible error in view of the fact that the case was tried before the judges. After referring to the high character of the three judges who sat in that case, Judge Offutt concluded that judges acting as jurors are as other men and that it was reasonable to assume that they would not have allowed the illegal statements to be made or the evidence be introduced "unless they believed them proper and material to aid them in determining the case since, to

assume anything else it is necessary to believe a manifest absurdity, which is that they admitted such statements or evidence knowing them to be improper, arbitrarily without any reason, and without intending to be bound by them."

In Duffy's case certain instructions were given to the jury with respect to their verdict during the absence of the traverser from the courtroom. There appears to have been but little doubt that this was a mere procedural defect which did not, in any way, work to the traverser's disadvantage. Yet, it was wrong in law and the case was reversed, Judge Offutt observing that in order *"to preserve the integrity of the Constitutional provisions to which we have referred, in our opinion, it would be unsafe to sanction the procedure followed in this case."*

So, too, with respect to private property. Judge Offutt knew what seems to have been forgotten of late: That there can be no personal liberty unless there is also private property.

Read his opinions in the zoning cases; for in my judgment, the positions which he took in them cannot be answered. The question before the court in those cases was not whether zoning was a good or bad public policy, but whether or not private property could be taken for a public use without just compensation.

In *Goldman v. Crowther*, 147 Md. 282, in discussing the police power, Judge Offutt said, *"there must in the very nature of things be some limit to it, for otherwise the guaranties of written Constitutions would be little more than mere precatory and directory suggestions without force or life, affording to the citizen only a false and illusory protection against the invasion of his rights by the State and his security would depend not upon Constitutional guaranties but upon the will of the State in exercising an unlimited police power."* He followed that statement up with this one: *"To determine where the rights of the individual end, and those of the public begin is a question which must be determined by the courts."* Judge Offutt properly observed about the court's action

respecting the ordinance then before it that any other course "*would tend to substitute for the government of law under which we now live a government under which the rights of citizens would depend not upon the plain terms of written Constitutions, but upon the judgment and opinions of legislative majorities and the officials composing the many boards, commissions and other agencies clothed with executive, judicial, administrative and legislative powers, through which so large a part of our government is carried on.*"

In *Tighe v. Osborne*, 149 Md. 349, he again voiced his opposition to an extension of the police power by the judiciary to the injury of the uncompensated owner of private property. The police power as it had been theretofore understood, he noted, permitted reasonable regulations necessary to preserve the public order, health, safety, or morals. Some of the text writers had added too the words "*general welfare.*" Judge Offutt declared those words indicated no extension of the police power but that they were merely synonymous with the specific objects previously enumerated. He then added that if the police power was to be "*extended to all objects which could be embraced within the meaning of the words 'general welfare' as defined by the lexicographers, the Constitutions would be so much waste paper because no right of the individual would be beyond its reach, and every property right and personal privilege and immunity of the citizen could be invaded at the will of the State, whenever in its judgment the convenience, prosperity, or mental or physical comfort of the public required.*"

His dissenting opinion in *R. B. Construction Company v. Jackson*, 152 Md. 671, in my judgment, is an unanswerable argument in favor of the soundness of his positions in the zoning cases. His analysis in that case of how the owners of private property had been limited in the use of their property under the guise of the exercise of the police power is devastating in its thoroughness. In effect, he shows that by the mere use of certain words a property owner could be deprived of a sub-

stantial part of the use of his property though the meaning of the words thus employed was shown to have no relation to the particular properties involved. Thus property in six different tracts similar in topography and in proximity to highways and having similar advantages of fire, police and sanitary protection were arbitrarily differentiated with respect to the use of the property in each of the six tracts so that for instance the owner in one of the tracts could utilize 75 per cent. of his property while the owner in another of the tracts could only utilize 25 per cent. of his. Judge Offutt's view in that case seems like that of a famous judge who observed in one of his opinions: "*I am unable to subscribe to that philosophy which seems to teach that a forbidden result may nevertheless be achieved if only some delusive and devious way of achieving it can be found.*"

A commentary on the soundness of Judge Offutt's views on the proper judicial approach to Constitutional questions is to be found, I believe, in recent decisions of the Supreme Court of the United States, two of which I particularly refer to, namely: *Helvering v. Davis*, 301 U. S. 619 and *Wickard v. Filburn*, 317 U. S. 111.

In the first of these cases the Supreme Court considered the Constitutional meaning of the words "general welfare" in Article 1, Section 8 of the Constitution of the United States. That section gives to Congress the power to lay and collect taxes "to pay the debts and provide for the common defense and general welfare of the United States * * *." The court in an opinion by Justice Cardoza gave one of those "liberal" decisions which the unwary are apt to praise. The court held, in effect, that the words "general welfare" constituted of themselves a separate and independent grant of power to the Federal government. It will be remembered that in *Tighe v. Osborne*, Judge Offutt had pointed out in discussing the extent of the police power that a "liberal" construction of the words "general welfare" would make of the Constitution "so much waste paper." It is interesting historically to remember too that Thomas Jef-

person as long ago as 1825 saw the danger of any such radical decision as the Supreme Court made in *Helvering v. Davis*. In discussing the "general welfare" clause, he noted that if it were to be interpreted as being a separate grant of power to the Federal government that government could "*do whatever they may think or pretend would promote the general welfare, which construction would make that of itself a complete government without limitation of power.*" Yet in a recent book by one of our leading historians, Justice Cardoza's opinion in the case just referred to is declared to be just plain common sense clothed in living prose; the Justice's literary style being especially praised! Thus, with the Federal taxing power supreme where it can be Constitutionally applied it follows, under *Helvering v. Davis*, that almost unlimited power has been given to the Federal government to disrupt the Federal union in which the national government was thought to have been limited to certain specific powers.

In *Wickard v. Filburn*, the Supreme Court held that the use of Federal funds to carry out a plan promulgated by the Secretary of Agriculture whereby farmers who complied with that plan would be guaranteed, out of the Federal treasury, a price for their wheat much above the world market price was entirely Constitutional. It was held in that case, too, that a farmer in the State of Ohio who had raised more wheat on his farm than was permitted under the Secretary's plan, intending to use and consume the wheat on his own farm, was subject to a penalty. In that case the decision was based largely on an extension of the meaning of the commerce clause. Within a month, too, of the present time, the Circuit Court of Appeals for the Fourth Federal Circuit, doubtless under the compulsion of Supreme Court decisions, has held that a street railway operating wholly within the City of Baltimore and the adjoining counties so "affected" by its operations the interstate commerce of the United States that the company's relations with its employees could be controlled by Federal law.

Judge Offutt's opinion in the paperhanger's case, *Dasch v. Jackson*, 170 Md. 251 (124 A. L. R. 543), is

worth a careful reading, especially in these times, by anyone who believes in the realities of American Constitutional law. In that case, an Act of the General Assembly of 1935 attempted to regulate in the most meticulous way the occupation of paperhangers. In his opinion, Judge Offutt said: "*It is a recognized principle of American Constitutional law that every man has the right to labor, to contract, to hold property, and in his own way to pursue happiness. That is liberty. It is implicit in the Declaration of Independence, in the Federal Constitution and in the Constitutions of the several States.*" In the exercise of the police power, however, the Legislature has the right to enact laws for the protection of the public safety, health, or morals. But, as Judge Offutt observed, "*That power, however, is itself subject to the restraints imposed by Constitutions which the whole people have adopted and approved as the supreme law of the land.*" The Paperhangers Act was declared to be unconstitutional.

It is of particular interest to note a recent decision of the Supreme Court of North Dakota, where a similar Act respecting photographers was declared unconstitutional.

State of North Dakota v. Cromwell, 9 N. W. R. (2) 914: The court in that case declared, respecting the police power: "*It cannot disregard the Constitutional guarantees. And whether it does so is a question for the courts to determine.*" How important then it is for the various state courts to continue to perform their Constitutional functions in the American manner without regard to what has developed in the Federal field.

The late Lord Chief Justice of England, Lord Hewart, in his book, *The New Despotism*, gives us evidence of the great value of our written American Constitutions. In England with the legislature supreme, boards and commissions have been set up which have acted and are continuing to act in an arbitrary and despotic manner. However imperfectly our system may work in particular cases, our ideal is a government of law and not of men; and we should preserve it. Here again is well to refer to the language of Judge Offutt in *Goldman v. Crowther*

about legislative majorities and officials, boards, commissions and others who transact so large a part of our government's business. With us the courts have the power and the duty to prevent the agencies of government from acting in an unfair or arbitrary manner. That is the basis of American Constitutional law and Judge Offutt's opinions show how well he understood and soundly applied our Constitutional principles.

Judge Offutt wrote able opinions on many other subjects. I select a few at random for reference here: 144 Md. 303—conditional acceptance, 155 Md. 51—covenants not to sue, 168 Md. 400—joint and several liability, 169 Md. 240—confidential relations, 174 Md. 650—dividends as between life tenant and remainderman, 177 Md. 248—contracts for personal services.

The theory of the "flexible" Constitution Judge Offutt understood for what in essence it is, that is, the giving way by the judges before the particular pressures of the time. If the Constitution as interpreted by the judges was thought to be defective, Judge Offutt's view was that the remedy was to amend the Constitution. What has, in fact, happened to the Constitution of the United States under this "flexible" theory can now be seen by all men. Is the result good? If so, not only the people of the United States, but thoughtful observers in many foreign lands have been deceiving themselves from time to time during the last 150 years.

His last opinion is in the case of *Miller v. Miller*, 178 Md. 12. Here the judicial voice of this sturdy judge was heard for the last time when he said: "*Within reasonable limits the husband, as the head of the family, has the right to say who shall or who shall not visit the home, * * * and while the absolute quality of that right had been much modified since Evans v. Evans * * * nevertheless the right of the husband to exclude from his home persons who are offensive or obnoxious to him ought not to be doubted.*"

Judge Offutt was a man of wide intellectual interests and his library at home with its shelves of much-used books indicates how broad those interests were. Strong

as he was in his beliefs, he was yet at home in the scholarly society of the leading law professors and those who were active in the important work of the American Law Institute. He served on a committee with a group of distinguished persons as one of the advisors on the American Law Institute's Restatement of the Law of Torts. The chairman of that committee was the late Francis H. Bohlen, a world famous authority on that subject. On that committee from time to time were such outstanding men as Charles McHenry Howard, Benjamin N. Cardozo, Warren A. Seavey, Edwin S. Thurston and George W. Wheeler. Yet, as stated, for the skepticism which so often shows itself in the teachings of our present-day law schools he had no sympathy. In the "social engineering" of these schools of thought he had no belief, for "social engineering" could only be sound if the engineer's goal could be defined and that is an impossibility. Law comes not by preconceived plan, but it is evolved from the forces which create it. The most that can be done is to correct the obvious abuses as they appear, from time to time, but otherwise to stand firmly on basic principles.

Passing judgment for all time is beyond my ken, and oblivion, we are reminded, swallows us up remorselessly. Considering Judge Offutt's strength of character and convictions, his courage, his industry, the breadth of his intellectual interests, his firm grasp of legal principles as shown in the opinions he wrote, my deliberate opinion is that he had no superior on the Maryland Bench since I came to the Bar.

CHIEF JUDGE SLOAN:

Judge Thiemann Scott Offutt was not cast in any ordinary mould. Physically he was one to attract attention anywhere. He was of impressive appearance, strong, powerful, athletic. Intellectually his mind was a perfect match for the physical. These attributes he possessed until he was suddenly stricken, a month after he had attained the age of sixty-eight, and two years before the State Constitution had fixed the day of his retire-

ment. It was one of the inscrutable manifestations of Providence not given to us to understand or comprehend.

The tribute we pay to Judge Offutt today is largely a personal one to a beloved and much admired associate. This ceremony is an expression of affection for the man with whom we were closely associated and whose passing we mourn. His record as a jurist is in the hands of posterity, and must be submitted to the judgment of his fellows in the profession in the years to come.

What Judge F. Neal Parke, who served with Judge Offutt on this Court for sixteen years, had to say, aptly expresses the idea I would convey:

"The just measure of a judge is not fulfilled until time has removed the effect of his presence and, dissipating the sentiments of friendship or enmity, permits his stature to be observed in the company of the illustrious dead. So, there is no present perspective to assign to Judge Offutt his permanent rank in the Maryland judiciary.

"His vitality, industry and capacity made him a notable advocate at the Bar, and gave him high rank as a trial lawyer. While he had the complete armor of a skilled pleader, he soundly conserved that, in practice fact held the mastery of theory.

"His wide experience at the trial table and in the varied affairs and interests of men, his intimate knowledge of their strength, of the reach of passion, intrigue and rectitude, richly endowed him for his work as Judge, and prepared him to accept, with Dante, the idea that justice is a certain straightness of rule, rejecting the oblique on either side."

There is no model or pattern for judges, except for one thing, the desire to do justice in accordance with the proper application of the established rules of law. In going over the history of this Court, you will find hardly any two alike. Some of them, none too brilliant in expressing themselves, are conspicuous for the soundness of their judgment, which, after all, marks a real judge, one who knows how to distinguish the right from the wrong. Some for the brilliancy of their language in expounding the law, and sometimes getting lost in the

maze of their own words. Some, who applied the rule, that a straight line is the shortest distance between two points. I have in mind two of our predecessors, who, while here, were overshadowed by some of their apparently more brilliant associates, whose reputations, long after their decease, have grown with the years, because of the accuracy of their statements of legal principles and the soundness of their conclusions.

One of the essentials of a judicial opinion is a clear and accurate statement of the facts. That's the case presented for decision and the result determines one to be or not to be a judge; that is the thing with which the litigant is most concerned. He doesn't care about the lawyer's sophistries. The rest of the opinion is the judge's argument for his conclusion, his statement of the law, which supports his conclusion. This argument, however, is the part of the opinion which must bear the scrutiny of the profession, and challenges its criticism.

In the case of Judge Offutt his opinions were marked by a clear statement of the facts and the questions submitted for decision. Clear statement is an art, in which he was a master, and no part of any opinion is more important excepting, of course, cases in which nothing is presented but a question of law, but then that question should be clearly stated. Judge Offutt was a prodigious writer, the result, perhaps, of habits acquired in his young days, when he was a reporter on the old Baltimore Herald. But no matter how much he wrote, his opinions always aimed directly at a proper conclusion, and it must be agreed that he was a man of sound judgment, who always strove to be right.

He acquired the reputation of being a very able judge in his own generation, which I predict will endure long after we have passed from this scene. In many opinions in the years to come will appear the phrase "Judge Offutt said."

With this inadequate tribute to our late associate, we can only say that we are of those who lament the passing of a great judge who was our brother.

Today's proceedings will be spread in the minutes of the Court, and out of respect to the memory of Judge Thiemann Scott Offutt, this Court does now adjourn.